Editor's note: appealed - aff'd, Civ.No. 82-2069 (D.D.C. June 24, 1983)

BRUCE LEMAIRE

IBLA 81-1074 Decided April 26, 1982

Appeal from decision of Montana State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer. M 47908.

Affirmed.

1. Oil and Gas Leases: Acreage Limitations--Oil and Gas Leases: Applications: Filing

   The Bureau of Land Management may properly reject a noncompetitive oil and gas lease offer where the acreage applied for, as determined from a protracted survey, exceeds the maximum allowable acreage under 43 CFR 3110.1-3(a).

APPEARANCES: Bruce LeMaire, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Bruce LeMaire has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated July 27, 1981, rejecting his noncompetitive oil and gas lease offer, M 47908, because BLM calculated that the acreage applied for (10,731 acres) exceeded the maximum acreage (10,240 acres) allowed in any one offer, citing 43 CFR 3110.1-3.

On June 23, 1980, appellant filed an offer to lease all of the land within secs. 4-9, 15-17, 20-22, 27, 28, 34, and 35, T. 28 N., R. 13 W., Principal meridian, Flathead County, Montana, pursuant to section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1976). Appellant listed the total acreage applied for at 10,240 acres. 1/

1/ The land is the subject of a protracted survey. Notice of Montana Protraction Diagram No. 37 was published in the Federal Register of May 11, 1961, effective on the thirty-first day thereafter "in accordance with 43 CFR 192.42a(c)" (now 43 CFR 3101.1-4(d)). 26 FR 4073 (May 11, 1961). The notice stated that "these protractions will become the basic record for the description of land in applications and offers." That protraction diagram covered, inter alia, T. 28 N., R. 13 W., Principal meridian, Montana. The protracted survey permitted BLM to determine the acreage covered by appellant's lease offer.

[1] The applicable regulation, 43 CFR 3110.1-3(a), provides in relevant part: "An offer may not include more than 10,240 acres." In his statement of reasons for appeal, appellant contends that BLM has "assumed" that his offer covered 10,731 acres and that until the land is surveyed on the ground it should be "presumed" that each section applied for contains 640 acres. In the alternative, appellant argues that

> the amount of acreage contained in my offer is within the legal limit in any case as it is within the 10% tolerance test that has always been allowed, and even though it was not included in the last amendments, the 10% tolerance test is still embedded in the law by necessity due to the fact there is no way to tell how much land is in a given section without a survey thereof.

Prior to June 16, 1980, the applicable regulation, 43 CFR 3110.1-3(a) (1979), provided: "An offer may not include more than 2,560 acres except where the rule of approximation applies." In addition, 43 CFR 3111.1-1(e) (1979) provided:

> (e) Curable defects. An offer to lease containing any of the following deficiencies will be approved by the signing officer provided all other requirements are met:
>
> * * * * * * *
>
> (2) An offer covering not more than 10 percent over the maximum allowable acreage of 2,560 acres. The lease will be approved for 2,560 acres in the discretion of the signing officer or so much over that amount as may be included under the rule of approximation.

The "rule of approximation," referred to in 43 CFR 3110.1-3(a) (1979), was set forth in the case of J. L. Dougan, A-26774 (Sept. 1, 1954). Therein the Acting Solicitor stated at page 3: "An offer which lists an acreage in excess of 2560 acres may be allowed if elimination of the smallest legal subdivision involved would result in a deficiency of area under 2560 acres greater than the excess over 2560 acres resulting from inclusion of such subdivision." (Footnote omitted.) See Natalie Z. Shell, 62 I.D. 417, 421 (1955).

However, with the promulgation of revised oil and gas regulations published in the Federal Register of May 23, 1980, effective June 16, 1980, the above-quoted regulations were substantially altered. See 45 FR 35163 (May 23, 1980). The maximum acreage for noncompetitive lease offers was increased from 2,560 acres to 10,240 acres. Furthermore, reference to the "rule of approximation" was eliminated. As explained in the preamble to the proposed regulations, the rule "would be eliminated because it is cumbersome and unnecessary if there is a

substantial increase in acreage." 44 FR 56177 (Sept. 28, 1979). 2/ Finally, 43 CFR 3111.1-1(e)(2) (1979), treating an offer covering not more than 10 percent over the maximum allowable acreage as a "curable defect," was deleted without explanation. 45 FR 35163 (May 23, 1980).

Cases prior to June 16, 1980, held that compliance with the regulation limiting the maximum acreage permitted in a noncompetitive lease offer was mandatory, and that where the rule of approximation did not apply, BLM properly rejected an offer which exceeded the maximum allowable acreage. Bruce Anderson, 69 I.D. 169 (1962); J. L. Dougan, supra. We can discern no reason to depart from that approach herein.

Appellant has offered no evidence that his lease offer covers 10,240 acres rather than the 10,731 acres established from the protraction diagram. He asserts only that until a surveyor completes a survey it must be assumed that each section contains 640 acres. However, the protracted survey was sufficient to allow BLM to calculate the acreage in the offer, and it exceeded the maximum allowable acreage by 491 acres. In such circumstances, the rule of approximation is not applicable, and the 10 percent "tolerance test" urged by appellant has been dropped from the regulations. Therefore, it cannot be used to cure appellant's defective offer.

Section 17 of the Mineral Leasing Act, supra, provides that land available for leasing shall be leased noncompetitively to "the person first making application for the lease who is qualified to hold a lease." 30 U.S.C. § 226(c) (1976) (emphasis added). In order to be "qualified," an applicant must comply with the requirements of the Department governing such applications. McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); Trans-Texas Energy, Inc., 56 IBLA 295 (1981); Arnold R. Gilbert, 63 I.D. 328 (1956).

2/ While this statement is meant to support deletion of the reference to the rule of approximation, clearly it does not do that. Merely raising the acreage limitation, regardless of how much, does not negate the necessity for the rule. Anytime there is an upper limit on the amount of acreage which may be included in an offer the rule would serve a useful purpose. As stated in J. L. Dougan, supra at 4:

"The rule of approximation has been adopted as a matter of principle to permit the holding of acreage in excess of a prescribed maximum where such excess holding is necessary to comport with the established practice of disposing of public lands by smallest legal subdivisions and to give the holder as nearly as possible the maximum acreage permitted by law or regulation."

However, since the rule of approximation is not applicable in this case we need not decide whether the deletion of the reference to the rule in the regulations has the effect of prohibiting the Department from using the rule as part of the common law of the Department.

In the present case, appellant cannot be deemed a "qualified" applicant where his lease offer exceeded the maximum allowable acreage. 3/ Accordingly, we hold that BLM properly rejected appellant's noncompetitive oil and gas lease offer. See Gary E. Strong, 57 IBLA 306 (1981); Robert W. David, 35 IBLA 205 (1978).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Douglas E. Henriques
Administrative Judge

3/ We note that the record indicates that appellant was also not the first applicant with respect to certain parcels of land sought.